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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re H.C., IV, et al., Persons Coming Under the Juvenile Court Law.	
KERN CO. DEPT. OF HUMAN SERVICES, Plaintiff and Respondent, v. H.C., III, Defendant and Appellant.	F057163/F057380 (Super. Ct. Nos. JD115525 & JD112371) **OPINION**

THE COURT[*]

APPEAL from orders of the Superior Court of Kern County. Robert J. Anspach, Judge.

Teri Ann Kanefield, under appointment by the Court of Appeal, for Defendant and Appellant.

Theresa A. Goldner, County Counsel, and Susan M. Gill, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

H.C., III (father), appeals from orders terminating parental rights (Welf. & Inst. Code, § 366.26) to his young daughter and son.[1] Father challenges the children's placement with their maternal grandparents instead of their paternal grandparents. He also disputes the court's earlier finding that proper notice had been given pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). On review, we conclude the time has passed for father to raise such arguments and so we affirm.

PROCEDURAL AND FACTUAL HISTORY

At the time of daughter's birth in 2006, her mother tested positive for a controlled substance. Mother's drug abuse, coupled with father's alcohol consumption and domestic violence in the home, led respondent Kern County Department of Human Services (the department) to detain daughter and initiate dependency proceedings under section 300, subdivision (b) (neglect). The Kern County Superior Court in January 2007 exercised its dependency jurisdiction and adjudged daughter a dependent child as well as removed her from parental custody. The department meanwhile had placed daughter with her maternal grandparents who also accepted placement of her half sibling. As of this point in the proceedings, each parent expressly denied any American Indian heritage.

Despite reasonable reunification services during the first half of 2007, mother made minimal efforts and progress. By contrast, father made moderate progress, having completed a number of programs. On the other hand, he resisted court-ordered random drug testing. In mid-2007, the court continued daughter's out-of-home placement as well as reunification services for each parent.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Because each child shares the same initials as father, we will refer to his children individually as "daughter" and "son" and collectively as "children."

In August 2007, the couple's son was born. The department immediately detained him and initiated dependency proceedings based on mother's untreated drug abuse, daughter's dependency, and father's failure to protect based on his alleged substance abuse. The department placed the newborn with daughter and the children's half sibling in the maternal grandparents' home. At the detention hearing for son, neither parent claimed any Indian ancestry.

By September 2007, it appeared father no longer resisted drug testing. Although he exhibited irrational or aggressive behavior toward the department's staff and still had "some skills to improve upon," the trial court found daughter's out-of-home placement was no longer necessary. Consequently, at a mid-September 2007 hearing, the trial court placed daughter with father under a family maintenance plan. It also ordered an extended visit for son with father pending a jurisdictional hearing in that child's case. The court further ordered father to continue submitting to random drug testing.

In late September 2007, the court exercised its dependency jurisdiction over son based on mother's history of drug abuse and daughter's dependency. (§ 300, subds. (b) & (j).) It also removed son from mother's custody and ordered reunification services for her. Part of mother's reunification plan called for twice-weekly visitation with son to be supervised by the department or its designee. The court meanwhile placed son with father.

In April 2008, the department detained the children and again placed them with their maternal grandparents. Father had left the children with their mother on numerous occasions, despite the court's order that mother's visits with the children be supervised by the department or its designee. The department consequently petitioned (§ 387) that the court's previous orders placing the children with father had not been effective.

While the April supplemental petition was pending, the department apparently designated the maternal grandmother to supervise each parent's visits with the children. Father questioned the department's designation. Specifically, he asked in late April 2008

why the maternal grandmother, rather than someone from his family, could have the children and supervise visits. He claimed his mother was cleared for placement.

A social worker advised father the department previously cleared the paternal grandmother to visit but did not clear her for placement or to be the department's designee for supervising visits. There is no record evidence explaining why the paternal grandmother was not cleared for placement.[2] The appellate record discloses only that in late November 2006 the department was in the process of evaluating the paternal grandmother for placement purposes. At the same time, however, the department made a placement decision and placed daughter with the maternal grandparents.

During a jurisdictional hearing on the April supplemental petition, father testified on his own behalf. He commenced by stating he might have Indian heritage. He identified the tribes as "Choctaw and Blackfoot from my grandmother. Seminole from my grandfather, my mother's side." He offered no further explanation.

According to father. social workers knew mother had some unsupervised contact with the children and did not voice any disapproval. Father also claimed he was in fact the department's designee for supervising mother's visits. He further testified he would never allow the children to be around mother if he knew "she was doing drugs."

The court was not convinced the children were at risk because of what had happened and dismissed the April supplemental petition. The court added, however, it thought father was "fudging a little bit" and reminded him to "pay attention" and "play by the rules." After the hearing, father signed an affidavit stating his understanding that

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[2] The record contains a much later unsworn statement by the department's attorney that the paternal grandparents were previously denied placement due to criminal and/or CPS history. An attorney's unsworn statement, however, is not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, fn. 11.)

he could not allow his children to be in their mother's presence and all contact between the children and mother was "to go through" the social worker or the department.[3]

Although the department returned the children to father in late June, their return was short lived. On July 8, 2008, the department once more detained the children.

Father had resumed his practice of not submitting to drug testing and allowing the children to be in mother's presence without the department's authorized supervision. Father also did not provide son with medical care for his recurrent respiratory problems so as to place son at risk of serious physical harm. Consequently, the department in July 2008 filed a second supplemental petition to remove the children from father's custody.

At a July 11, 2008 detention hearing, father denied the July supplemental petition's allegations and asked the court to either return the children to him or place them with his mother and stepfather. The court ordered the children detained and ordered the issue of relative placement kept open for 30 days. As the hearing concluded, the department claimed it had been unable to obtain specific information about father's recent claim of Indian heritage. The court in turn instructed father to meet with the current social worker after the hearing and provide whatever information might be helpful in their search.

On July 15, 2008, the department placed the children once more with the maternal grandparents, who continued to provide care for the children's half sibling. That same day, a social worker contacted the paternal grandmother and left a message, with her, for father about the placement decision as well as his visitation schedule. The paternal grandmother said she would inform father and expressed her own desire for visits with the children.

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[3] By this point, the court had terminated mother's reunification services as to both children.

Later in July, the department sent notice pursuant to ICWA on two occasions to each parent and the Bureau of Indian Affairs as well as federally recognized Seminole Indian tribes and Cherokee Indian tribes. The record contains no explanation as to why notice was sent to Cherokee Indian tribes and not Choctaw and Blackfoot Indian tribes.

The next hearing on the July supplemental petition occurred on August 8, 2008. Father requested a continuance in order to subpoena witnesses. The court granted father's request and continued the matter to August 22, 2008 for a jurisdictional hearing on the supplemental petition. In father's presence, the court found appropriate notice had been given "to the Bureau of Indian Affairs, and Cherokee and Semi[n]ole tribes." Father voiced no objection regarding the ICWA notice nor did he question why the children were not placed with the paternal grandmother.

The August 8, 2008 proceeding was the last court hearing father attended until the section 366.26 hearing conducted in February 2009. The last reported visit father had with his children was in late July 2008. Father allegedly assaulted mother in mid-August and there was an active warrant for his arrest on a spousal abuse charge starting in September. Father was reportedly concerned he would be arrested if he went to visit the children.

In September 2008, the court conducted both jurisdictional and dispositional hearings on the department's July 2008 supplemental petition. The court found: father received proper notice; the allegations contained in the July 2008 supplemental petition true; and its prior orders had not been effective in protecting the children. The court made additional findings to remove both children from father's custody and deny him reunification services as to each child (§ 361.5, subd. (b)(3) & (10)). The court further found: each child's out-of-home placement was appropriate and necessary; and proper notice had been provided pursuant to ICWA.

Under the circumstances, the court concluded by setting a section 366.26 hearing in February 2009 to select and implement permanent plans for the children. Notice of

father's writ remedy was mailed to his last known address. He did not pursue a petition for extraordinary writ review with this court.

In advance of the section 366.26 hearing, the department prepared a social study in which it recommended the court find both children adoptable and order parental rights terminated. Father was eventually located and served with notice of the section 366.26 hearing.

At the February 2009 hearing, father's attorney objected to a permanent plan of adoption for the children and, in particular, adoption by the children's maternal grandparents, whom the department had characterized as their prospective adoptive parents. The attorney also asked on father's behalf that the department seriously explore placing the children with his parents.

The court terminated parental rights, having found clear and convincing evidence that the children were likely to be adopted.

DISCUSSION

I.

As previously mentioned, father challenges the children's placement with their maternal grandparents instead of their paternal grandparents. Specifically, he contends this court should reverse the orders terminating his rights because the department never provided an assessment of why it denied the paternal grandparents placement of the children and in turn the court never stated for the record the reasons why placement with the paternal grandparents was denied. He relies on section 361.3, subdivision (e), which states:

> "If the court does not place the child with a relative who has been considered for placement pursuant to this section, the court shall state for the record the reasons placement with that relative was denied."

Section 361.3 affords a dependent child's relatives preferential consideration for placement when the child is removed from parental custody.

For reasons discussed below, father is not entitled to this court's review of his claim.

To begin, father's argument over placement is untimely. Relative placement preference was most recently at issue once the department re-detained the children in July 2008. (§ 361.3, subds. (a) & (d).) The court left the placement issue open to litigate for 30 days thereafter. However, father did not subsequently challenge, within that time frame, the department's decision to once again place the children with the maternal grandparents. The trial court thereafter conducted its October 2008 dispositional hearing, at which it found each child's out-of-home placement was appropriate and necessary. Notably, father did not attend this dispositional hearing or give his trial attorney any instructions regarding how to proceed.

Because the court also set a section 366.26 hearing as part of its October 2008 disposition, it was incumbent on father to voice any complaint regarding the court's decision, including its handling of the placement issue, by way of a petition for extraordinary writ review to this court. (§ 366.26, subd. (*l*).) Father did not pursue, however, his writ remedy. His failure to do so precludes our review on this appeal of the trial court's earlier findings and orders. (§ 366.26, subd. (*l*)(2); *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1024.)

Second, the court's purported failure to make a finding under section 361.3, subdivision (e) does not persuade us that the issue somehow remained open and subject to our review on this appeal from the termination orders. Father fails to cite and we know of no authority to support such a claim. He also ignores the children's overriding interest in a stable placement. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) In this case, that placement was with the maternal grandparents, who repeatedly provided a safe and secure home for the children when the parents could not.

To the extent father asserts his attorney's argument at the section 366.26 hearing somehow preserved placement as an issue for our review, we also disagree. It is only

when a child's placement needs to be changed, regardless of a relative-placement request, that the trial court must consider the issue of relative placement. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1328.) That time had come and gone by the time of the section 366.26 hearing in this case. Moreover, counsel's argument did not constitute evidence that the children's placement had to be changed as of the section 366.26 hearing. (*In re Zeth S., supra,* 31 Cal.4th at pp. 413-414, fn. 11.)

Furthermore, placement is not at issue in a section 366.26 hearing. The question before the court is whether there is clear and convincing evidence the child is likely to be adopted. (§ 366.26, subd. (c)(1).) If so, as in this case, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances in section 366.26, subdivision (c)(1) provides a compelling reason for finding that termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) One parent's wish for placement of his children with his relatives rather than the other parent's relatives is not a basis for finding detriment under section 366.26, subdivision (c)(1).

II.

Father also challenges for the first time the trial court's October 2008 determination that ICWA did not apply in this case. He criticizes the fact that the department did not serve its ICWA notice upon Choctaw and Blackfoot Indian tribes through which he claimed Native American heritage. He also claims the notices contained misinformation. As with his prior argument, the time for father to raise such complaint has passed.

Father was served a copy of the department's ICWA notice and was present at the August 8, 2008 hearing when the court first announced proper notice had been given to the Seminole and Cherokee tribes. Yet, father, who was never reluctant to speak out in court and in fact represented himself in propria persona with regard to daughter's

dependency, did not voice any objection in the trial court where his claims could have been easily addressed.

In any event, the court found there was proper notice under ICWA when it set the section 366.26 hearing. The ICWA finding was therefore subject to possible review by way of a petition for extraordinary writ review. (§ 366.26, subd. (*l*).) However, as discussed above, father failed to pursue his writ remedy. His failure to do so precludes our review on this appeal of the trial court's earlier findings and orders (§ 366.26, subd. (*l*)(2); *In re Anthony B., supra,* 72 Cal.App.4th at p. 1024), including the ICWA finding.

The fact that father's challenge goes to the applicability of ICWA does not entitle him to overcome his appellate forfeiture of the issue. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 191.) A parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues once the court's ruling is final in a subsequent appeal. In so ruling, we specifically held we were only addressing the rights of the parent, not those of a tribe. The parent's appellate forfeiture does not foreclose any tribe's rights under ICWA. (*In re Pedro N., supra,* at p. 191.)

DISPOSITION

The orders terminating parental rights are affirmed.